

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
January 7, 2010 Session

RUSSELL H. HIPPE, JR. v. MILLER & MARTIN, PLLC

**Appeal from the Chancery Court for Davidson County
No. 09-057-IV Russell Perkins, Chancellor**

No. M2009-01917-COA-R3-CV - Filed January 28, 2010

Retired attorney sued his former law firm to enforce contractual retirement benefits. The chancellor granted the firm's motion to dismiss based on the statute of limitations. We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed

ANDY D. BENNETT, J., delivered the opinion of the Court, in which PATRICIA J. COTTRELL, P.J., M.S., and RICHARD H. DINKINS, J., joined.

James H. Harris, III, Nashville, Tennessee, for the appellant, Russell H. Hippe, Jr.

John P. Branham, Nashville, Tennessee, for the appellee, Miller & Martin, PLLC.

OPINION

Russell H. Hippe, Jr. is an attorney who practiced law in Nashville for many years. Between 1965 and 1996, he practiced law in and became a partner of the firm of Trabue, Sturdivant and DeWitt.¹ A provision in the partnership agreement stated: "The Firm shall pay a retiring Partner the amounts specified in paragraphs 6.02(b)(1)-(3) in the same way and paid at the same times as if he had died on the effective date of his retirement."

In November 1994, Mr. Hippe's partners voted not to pay him any retirement benefits unless he retired from the practice of law by the end of 1995. According to his complaint, this partnership vote "compelled" Mr. Hippe to withdraw from the partnership of the firm as of December 31, 1994. He negotiated an agreement with the managing partner of the firm that allowed him to continue practicing with the firm until the end of 1995. On January 15,

¹The appellee, Miller & Martin, is the successor to Trabue, Sturdivant & DeWitt.

1995, the partners executed an amendment to the partnership agreement that phased out the retirement benefit. In November 1995, Mr. Hippe notified the firm that he was leaving at the end of 1995 but that he was not retiring from the practice of law. In December 1995, he notified the policy committee of the firm that the vote taken in November 1994 “constituted a breach of the Trabue Partnership Agreement.”

Mr. Hippe practiced law as a sole practitioner for over two years and then joined the Waller Lansden firm. He returned to solo practice in 2001. He offered to return to the former Trabue firm (by then, Miller & Martin) if the firm agreed to pay his retirement benefits in accordance with the Trabue Partnership Agreement. Miller & Martin did not respond. In 2002, Mr. Hippe joined Stites & Harbison, where he practiced until his retirement in 2008.

In December 2007, Mr. Hippe notified Miller & Martin that he was retiring from the practice of law and requested the firm to begin to pay his retirement benefits. The firm declined. On January 13, 2009, Mr. Hippe filed a verified complaint alleging breach of contract. On March 20, 2009, he filed an amended verified complaint alleging breach of contract and seeking punitive damages and attorney’s fees. Miller & Martin filed a motion to dismiss, which the trial court granted.

Standard of Review

The issue raised in this matter is whether the trial court erred in granting the defendants’ motion to dismiss. The purpose of a Rule 12.02(6) motion to dismiss is to test the legal sufficiency of the complaint, not the strength of the complainant’s proof. *Doe v. Sundquist*, 2 S.W.3d 919, 922 (Tenn. 1999). In reviewing a trial court’s ruling on a motion to dismiss based on Rule 12.02(6), we must liberally construe the pleadings, presuming all factual allegations are true and drawing all reasonable inferences in favor of the complainant. *Tigg v. Pirelli Tire Corp.*, 232 S.W.3d 28, 31 (Tenn. 2007); *Kincaid v. SouthTrust Bank*, 221 S.W.3d 32, 37 (Tenn. Ct. App. 2006). The motion to dismiss should be denied unless it appears that Mr. Hippe can prove no set of facts in support of his claim against Miller & Martin that would entitle him to relief. *See Bell ex rel. Snyder v. Icard, Merrill, Cullis, Timm, Furen & Ginsburg, P.A.*, 986 S.W.2d 550, 554 (Tenn. 1999).

Analysis

An “anticipatory breach” of a contract occurs when a party repudiates the contract before the time that the contract requires a party to perform. *UT Med. Group, Inc. v. Vogt*, 235 S.W.3d 110, 120 (Tenn. 2007). For there to be an anticipatory breach, “the words and conduct of the contracting party must amount to a total and unqualified refusal to perform

the contract.” *Wright v. Wright*, 832 S.W.2d 542, 545 (Tenn. Ct. App. 1991). The Tennessee Supreme Court has found:

Believing that another party has committed an anticipatory breach of a contract, the non-breaching party may elect to take one of three courses of action: (1) rescind the contract and pursue remedies based on a rescission; (2) treat the repudiation as an immediate breach by bringing suit or changing position in some way; or (3) await the time for performance of the contract and bring suit after that time has arrived.

Vogt, 235 S.W.3d at 120 (citing 23 Samuel Williston, *TREATISE ON THE LAW OF CONTRACTS* § 63.33 (Richard A. Lord ed., 4th ed. 2002)).

Mr. Hippe claims that the cause of action did not arise until he retired from the practice of law. Yet, he stated in his complaint that he felt “compelled” to leave the firm after the November 1994 vote not to pay his retirement benefits unless he retired from the practice of law by the end of 1995. In December 1994, he withdrew from the partnership. In January 1995, the partners voted to phase out the retirement benefit, and in December of that year Mr. Hippe informed the firm that they had breached the Trabue Partnership Agreement. As the chancellor correctly concluded, Mr. Hippe “chose option 2 under the *Vogt* case.”

Since Mr. Hippe chose to treat the repudiation as an immediate breach by withdrawing as a partner, notifying the firm of the alleged breach, and eventually leaving the firm, the six-year statute of limitations in Tenn. Code Ann. § 28-3-109(a)(3) began to run, at the latest, when he left the firm at the end of 1995. It follows that the chancellor’s ruling that the breach of contract claim should be dismissed as barred by the statute of limitations was correct and should be affirmed.

The chancellor also properly dismissed Mr. Hippe’s claim for punitive damages based on the firm’s violation of the Code of Professional Responsibility. The Tennessee Supreme Court Rules state: “Violation of a Rule should not give rise to a cause of action. . . . The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability.” Tenn. S. Ct. R. 8, Scope 6.

Since we have determined that the chancellor’s dismissal of Mr. Hippe’s breach of contract and punitive damages claims was correct, Mr. Hippe has no claim for attorney’s fees either.

The chancellor's grant of the motion to dismiss is affirmed in all respects. Costs of appeal are assessed against the appellant, Russell H. Hippe, Jr., for which execution may issue if necessary.

ANDY D. BENNETT, JUDGE